132

Supreme Court, U.S.
FILED
JUN 26 2009
OFFICE OF THE CLERK

No. 08-1 09-7

IN THE

Supreme Court of the United States

JAMES STEVENS,

Petitioner,

v.

VONS COMPANIES,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, SECOND APPELLATE DISTRICT, DIVISION SIX

PETITION FOR A WRIT OF CERTIORARI

AREVA D. MARTIN
Counsel of Record
ARAM KOUYOUMDJIAN
MARTIN & MARTIN, LLP
Attorneys for Petitioner
3530 Wilshire Boulevard
Suite 1650
Los Angeles, CA 90010
(213) 388-4747

223540

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTION PRESENTED

Whether the State of California is thwarting proper constitutional analysis of punitive damages by maintaining and applying its own separate test to assess such damages, when the test (1) substantively alters the criteria articulated in United States Supreme Court decisions as the measures by which punitive damages need be evaluated, and (2) substitutes "abuse of discretion" instead of "de novo" as the standard of review.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF CONTENTS	ii
TABLE OF APPENDICES	iv
TABLE OF CITED AUTHORITIES	v
OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL PROVISION INVOLVED	2
STATEMENT OF THE CASE	2
REASONS FOR GRANTING THE PETITION	4
I. California Standards Assessing the Excessiveness of Punitive Damages Conflict with This Court's Standards Assessing Their Constitutionality.	5
A. California Considers a Defendant's Wealth, a Criterion This Court Disapproves in Favor of Using Civil Penalties as a Measure of Comparison.	7

Contents

Page

II. Punitive Damages Under California Case Law May Be Reviewed Along an "Abuse of Discretion" Standard, Contrary to This Court's Mandate That Constitutional Review of Such Damages Be "De Novo." 9

III. *Neal*'s Inconsistency with This Court's Pronouncements Confuses the Role of Appellate Courts in Reviewing Punitive Damages. 13

CONCLUSION 15

TABLE OF APPENDICES

Page

Appendix A — Opinion of the Court of Appeal of California, Second Appellate District, Division Six, Filed January 20, 2009 and Modified February 18, 2009 ..... 1a

Appendix B — Order of the Superior Court of the State of California, County of Ventura, Filed January 16, 2007 ..... 34a

Appendix C — Judgment of the Superior Court of the State of California, County of Ventura Filed November 20, 2006 ..... 40a

Appendix D — Order of the Court of Appeal of California, Second Appellate District, Division Six, Denying Petition for Rehearing, Filed February 18, 2009 ..... 47a

Appendix E — Opinion of the Supreme Court of California Denying Petition for Review, Filed April 1, 2009 ..... 48a

TABLE OF CITED AUTHORITIES

Page

FEDERAL CASES

BMW of North America, Inc. v. Gore,
517 U.S. 559 (1996) 3, 4, 8

Cooper Industries, Inc. v. Leatherman Tool Group, Inc.,
532 U.S. 424 (2001) ..... *passim*

State Farm Mutual Auto. Ins. Co. v. Campbell,
538 U.S. 408 (2003) 4, 6, 7, 8, 9

CALIFORNIA CASES

Adams v. Murakami,
54 Cal.3d 105 (1991) 6

Devlin v. Kearny Mesa AMC/Jeep/Renault, Inc.,
155 Cal.App.3d 381 (1984) 6

Lane v. Hughes Aircraft Co.,
22 Cal.4th 405 (2000) 12

Neal v. Farmers Ins. Exchange,
21 Cal.3d 910 (1978) ..... *passim*

Simon v. San Paolo U.S. Holding Co.,
35 Cal.4th 1159 (2005) ..... *passim*

Cited Authorities

Page

CONSTITUTIONAL PROVISIONS

Constitution of the United States, Amendment XIV, § 1 ..... 2, 6

STATUTES

28 U.S.C. § 1257(a) 1

OPINIONS BELOW

The order of the Supreme Court of California denying James Stevens' petition for review, Pet. App. 48a, is reported at 2009 Cal.LEXIS 3613 (April 1, 2009).

The order of the California Court of Appeal, Second Appellate District, Division Six, denying rehearing, Pet. App. 47a, is reported at 2009 Cal.App.Unpub. LEXIS 1306 (February 18, 2009).

The opinion of the California Court of Appeal, Second Appellate District, Division Six, Pet. App. 1a-33a, is reported at 2009 Cal.App.Unpub.LEXIS 412 (January 12, 2009).

The judgment of the Superior Court of Ventura County, Pet. App. 40a-46a, and the subsequent order of remittitur, Pet. App. 34a-39a, are unreported.

JURISDICTION

The order of the Supreme Court of California denying Mr. Stevens' petition for review was entered on April 1, 2009. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

Amendment XIV to the Constitution of the United States

§ 1:

> All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

In his case for sexual harassment and retaliation in violation of California's Fair Employment & Housing Act, plaintiff James Stevens – Petitioner herein – won a compensatory damages award of $1,672,988 and a punitive damages award of $16,729,880 from a jury in the Superior Court of Ventura County. *See* Pet. App. 12a-13a. After the trial court reduced each award to $1.2 million on remittitur (Pet. App. 39a), defendant Vons appealed, and plaintiff filed a cross-appeal with respect to the reduction of punitive damages.

On appeal, Petitioner argued that the punitive damages awarded by the jury, in a 10-to-1 ratio to compensatory damages, fell "within the maximum constitutionally permissible award" and asked that the

jury award "be reinstated, or, in the a'ernative, [that] the punitive damages award . . . be increased to the absolute constitutional maximum." *See* Pet. App. 27a.

In support of his argument, Petitioner relied on United States Supreme Court pronouncements on the constitutionality of punitive damage awards, as incorporated into the California Supreme Court's decision in *Simon v. San Paolo U.S. Holding Co.*, 35 Cal.4th 1159 (2005). *See* Pet. Att. 27a. The California Court of Appeal for the Second Appellate District, Division Six, however, rejected that line of analysis without explanation. "Respondent's reliance on *Simon* is misplaced," its opinion stated. "The controlling authority for excessiveness under California law is *Neal v. Farmers Ins. Exchange* (1978) 21 Cal.3d 910." *See* Pet. Att. 27a-28a. The appellate court went on to affirm the reduced punitive damages. *See* Pet. Att. 33a.

Punitive damages in California are assessed by different criteria under *Neal* than they are under this Court's decisions. *Neal* considers a defendant's wealth or financial condition to be an "essential factor" in punitive damages analysis but takes no account of civil penalties as a measure of comparison, as required by *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 583 (1996), and its progeny. In addition, *Neal* allows an abuse of discretion standard to govern punitive damages analysis, even though cases since *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 436 (2001), have made clear that de novo review is warranted whenever courts are determining the constitutionality of punitive damages.

The appellate court declined to address this conflict by denying a Petition for Rehearing (Pet. App. 47a), and the California Supreme Court denied review on April 1, 2009. *See* Pet. App. 48a. Accordingly, Mr. Stevens timely and respectfully petitions for a writ of certiorari.

REASONS FOR GRANTING THE PETITION

Ever since decisions of this Court started lending punitive damage awards a constitutional dimension by considering excessiveness to be a Due Process violation, cases in California have suffered a lack of uniformity and certainty, given that two separate and conflicting standards – one state, one federal – have emerged with regard to the assessment of punitive damages. One line of analysis, following *Neal*, 21 Cal.3d 910, determines excessiveness under state law, while another probes constitutionality under federal law, as articulated by *State Farm Mutual Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (2003), and its predecessors, *BMW*, 517 U.S. 559, and *Cooper Industries*, 532 U.S. 424. The cases do not delineate, however, the circumstances that trigger analysis under *Neal* as opposed to federal constitutionality.

The distinction presents a critical issue of law, since *Neal* applies a deferential abuse of discretion standard, whereas constitutional analysis requires "exacting" de novo review. Indeed, the issue raises questions about the very role and function of appellate courts reviewing punitive damages.

In the present case, a jury awarded Petitioner punitive damages in a 10-to-1 ratio to compensatory damages for suffering sexual harassment and retaliation

in the workplace. Although this ratio implicated constitutional limits, the appellate court discarded due process analysis and chose to proceed solely under *Neal*, ruling – without explanation – that it was the governing standard.

This Court should grant certiorari to determine whether California is thwarting proper constitutional analysis of punitive damages by applying its own separate test to assess such damages, when the test (1) substantively alters the criteria articulated in United States Supreme Court decisions as the measures by which punitive damages need be evaluated, and (2) substitutes "abuse of discretion" instead of "de novo" as the standard of review.

I. CALIFORNIA STANDARDS ASSESSING THE EXCESSIVENESS OF PUNITIVE DAMAGES CONFLICT WITH THIS COURT'S STANDARDS ASSESSING THEIR CONSTITUTIONALITY.

With regard to punitive damages, California cases confront two conflicting – and unreconciled – sets of standards. One line of analysis, under the leading case of *Neal*, 21 Cal.3d 910, assesses the "excessiveness" of punitive damages as a matter of state law. A second line of analysis, under *Simon*, 35 Cal.4th 1159, determines whether they are excessive under the federal Constitution's due process protections set forth "in a series of [United States Supreme Court] decisions culminating in *State Farm*." *Id.* at 1171. Tension and uncertainty exist, however, as to which line of analysis applies in any particular case. For instance, *Simon* "addresses only the federal constitutional question, not any issue of excessiveness under California law," yet does

not indicate why. *Id.* at 1167. Of course, which analysis applies is a matter of utmost importance, since different substantive standards lead to different outcomes – and inconsistent results. In the present case, the appellate court opted to proceed under *Neal* to uphold a reduction of punitive damages, whereas federal cases like *State Farm* would have dictated a contrary result – that is, affirmance of the jury's original award.

California law considers the "excessiveness" of punitive damages. Courts determine whether an award "as a matter of law *appears* excessive" or if "the recovery is so grossly disproportionate as to raise a presumption that it is the result of passion or prejudice." *Neal*, 21 Cal.3d at 928 (emphasis added). Judging excessiveness based on appearance is a tenuous proposition, and the California Supreme Court itself has recognized that "the determination of whether an award is excessive is admittedly more art than science." *Adams v. Murakami*, 54 Cal.3d 105, 112 (1991). "The channeling of just the correct quantum of bile to reach the correct level of punitive damages is, to put it mildly, an unscientific process complicated by personality differences." *Id.* (*quoting Devlin v. Kearny Mesa AMC/Jeep/Renault, Inc.*, 155 Cal.App.3d 381, 388 (1984)).

Federal analysis articulates a different question – whether the "imposition of 'grossly excessive or arbitrary' awards is constitutionally prohibited" as violative of due process protections. *Simon*, 35 Cal.4th at 1171. A "grossly excessive" punitive damages award, as this Court has ruled, "constitutes an arbitrary deprivation of property" in violation of the Fourteenth Amendment. *State Farm*, 538 U.S. at 416-417.

In the present case, even though a punitive damages award with a 10-to-1 ratio was under examination, the appellate court declined to conduct a federal due process analysis, insisting that Petitioner's reliance on *Simon* – and its application of *State Farm*'s dictates – was "misplaced." *See* Pet. App. 27a. Rather, the appellate court insisted that "[t]he controlling authority for excessiveness under California law is *Neal*." *See* Pet. App. 28a. There was no attempt to explain why one standard was being discounted for another, even though an alternate choice would alter the analysis – and the ultimate result.

A. California Considers a Defendant's Wealth, a Criterion This Court Disapproves in Favor of Using Civil Penalties as a Measure of Comparison.

Substantive state and federal guidelines as to what factors are considered in assessing punitive damages differ. *Neal* dictates that a reviewing court examine the reprehensibility of the conduct involved, the relationship between the compensatory and punitive damages, and "the wealth of the particular defendant." 21 Cal. 3d at 928. *Neal* recognizes that "the function of deterrence will not be served if the wealth of the defendant allows him to absorb the award with little or no discomfort." *Id.* at 928. In fact, *Simon* interprets *Neal* to emphasize that "the defendant's financial condition is an essential factor in fixing an amount that is sufficient" to serve the goal of deterrence "without exceeding the necessary level of punishment." 35 Cal.4th at 1185.

This "essential factor" of the defendant's wealth, however, is not even figured into the federal calculus as articulated by *Simon* (citing precedent from this Court). This Court has actually been troubled by the fact that "the preservation of evidence of a defendant's net worth creates the potential that juries will use their verdicts to express biases against big businesses." *State Farm*, 538 U.S. at 417. Instead, the federal analysis substitutes an altogether different factor – "the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases." *Id.* at 418; *Cooper Industries*, 532 U.S. at 440; *BMW*, 517 U.S. at 575. While the federal guidelines retain the reprehensibility of defendant's conduct as a factor, even their consideration of the ratio between compensatory and punitive damages is modified to consider "the disparity between the actual or *potential* harm suffered by the plaintiff and the punitive damages award." *State Farm*, 538 U.S. at 418 (emphasis added); *cf. Cooper Industries*, 532 U.S. at 440.

An unresolved tension exists, then, between these two lines of analysis, with no clear demarcation as to which applies to a given case and how that determination is made. *Simon* limits its discussion "only to the federal constitutional question, not any issue of excessiveness under California law" (35 Cal.4th at 1167), without offering a rationale as to the inapplicability of the *Neal* standard. In similarly summary fashion, the appellate court in this case simply declared Petitioner's reliance on *Simon* to be "misplaced." *See* Pet. App. 27a. It went on to assess punitive damages under *Neal*, calling it "[t]he controlling authority for excessiveness under California law." *See* Pet. App. 28a.

It is doubtful that *Neal* itself would pass constitutional muster today, given that its 74-to-1 punitive-to-compensatory damages ratio (21 Cal.3d at 920, 927) would be unlikely to survive scrutiny under federal due process. Therefore, it seems to serve as an anomalous basis for declaring a 10-to-1 ratio excessive without engaging in any constitutional analysis. After all, the measure of punitive damages in Petitioner's case under a constitutional standard would have led to a different result – given that punitive damages awards that do not exceed a single-digit ratio "to a significant degree" are likely to fall within constitutionally permissible limits. *State Farm*, 538 U.S. at 425.

Petitioner requests that this Court issue a writ of certiorari to address a standard of analysis that conflicts with its prior rulings and yields outcomes inconsistent with constitutional requirements.

II. PUNITIVE DAMAGES UNDER CALIFORNIA CASE LAW MAY BE REVIEWED ALONG AN "ABUSE OF DISCRETION" STANDARD, CONTRARY TO THIS COURT'S MANDATE THAT CONSTITUTIONAL REVIEW OF SUCH DAMAGES BE "DE NOVO."

Differing state and federal standards governing the review of punitive damages yield incongruent results, since cases like *Cooper Industries* have made clear that constitutional analyses of punitive damages require independent de novo review, yet California cases under *Neal* follow a deferential abuse of discretion standard – the standard that was followed by the appellate court in the present case. The existence of dual standards leads to lack of uniformity in judicial decisions warranting address by this Court.

The California Supreme Court has acknowledged in *Simon* that

> [i]n deciding whether an award of punitive damages is constitutionally excessive under *State Farm* and its predecessors, we are to review the award de novo, making an independent assessment of the reprehensibility of the defendant's conduct, the relationship between the award and the harm done to the plaintiff, and the relationship between the award and the civil penalties authorized for comparable conduct.

35 Cal.4th at 1172.

That constitutional issues pertaining to punitive damages merited de novo review was established, in no uncertain terms, in *Cooper Industries*, 532 U.S. at 431. *Cooper Industries* endorsed that standard so that courts could achieve consistency in their application of legal principles. *Id.* a 436. Further, it recognized "[d]ifferences in the institutional competence of trial judges and appellate judges" and concluded that these "[c]onsiderations of institutional competence . . . fail to tip the balance in favor of deferential appellate review" (*id.* at 440), supporting independent appellate review instead.

Of utmost importance, *Cooper Industries* pointed out that independent appellate review could likely lead to a different outcome in a case. *Id.* at 441. Despite that practical, real world effect, the California Supreme Court sanctions the continued review of cases pursuant to an

abuse of discretion standard. It let stand the appellate court's assessment of Petitioner's case under an abuse of discretion standard, even though the punitive damages awarded to him in a 10-to-1 ratio implicated de novo constitutional analysis.

Indeed, even as it establishes that "[t]he requirement of independent review applies to state as well as federal appellate courts when assessing excessiveness under the federal due process clause," the California Supreme Court concedes in *Simon* that "when no federal due process is involved, as when awards are reviewed for excessiveness under *state* law, the high court's decisions do not forbid greater deference to jury verdicts or trial court judgments." 35 Cal.4th at 1172, fn. 2. *Neal* indicates, for example, that the standard for reviewing trial court reductions of punitive damages becomes abuse of discretion. Quoting well-settled precedent, *Neal* provides that when a trial court's actions

> in granting a new trial on the ground of excessive damages, or requiring a reduction of the amount as the condition of denying one, comes to be reviewed on appeal, his order will not be reversed unless it plainly appears that he abused his discretion. 21 Cal.3d at 932-933.

Whether an appellate court reviews an award of punitive damages de novo or under an abuse of discretion standard can thus devolve into a matter of chance. If a trial court were to issue a remittitur, for example, it would trigger the deferential abuse of discretion standard. At the same time, the existence

of two standards would be susceptible to legal manipulation, as parties might choose to rely on (or ignore) constitutional claims to trigger de novo review. Substantive review of punitive damages would thereby become subordinated to procedural posture.

In the present case, the appellate court adhered to the abuse of discretion standard, stating, "We will reverse the court's order only if the record is devoid of any substantial basis supporting the remittitur. In determining whether a substantial basis exists, 'the trial court's factual determinations . . . are entitled to the same deference that an appellate court would ordinarily accord a jury's factual determinations.'" *See* Pet. App. 29a (*quoting Lane v. Hughes Aircraft Co.*, 22 Cal.4th 405, 412 (2000)). In taking such an approach, the California courts abdicated their responsibility to independently review a punitive damages award with a 10-to-1 ratio that skirted constitutionally permissible limits. The appellate court's deferential stance, in particular, highlighted the very concern expressed by this Court in *Cooper Industries* regarding "[d]ifferences in the institutional competence of trial judges and appellate judges" (532 U.S. at 440) that favored the heightened expertise of the latter.

Absent a remittitur, assessing the constitutionality of the punitive damages awarded to Petitioner would have necessitated a de novo review. It follows that the process by which a standard of review attaches to any given appeal of a punitive damages award in California is, if not arbitrary, fraught with potential for manipulation, motivating parties to initiate post-trial motions and frame appellate arguments so as to

influence, through procedural tactics, the application of one standard over another.

Certiorari is warranted so that the Court can address the conflicting standards and ensure the uniform application of de novo review in order to eliminate the continued danger of inconsistent results.

III. *NEAL*'S INCONSISTENCY WITH THIS COURT'S PRONOUNCEMENTS CONFUSES THE ROLE OF APPELLATE COURTS IN REVIEWING PUNITIVE DAMAGES.

The varying standards of review applicable to the assessment of punitive damages in California – de novo under this Court's pronouncement in *Cooper Industries* and subsequent cases; abuse of discretion under the California Supreme Court's *Neal* decision -- create confusion as to the role of appellate courts reviewing those damages.

In reviewing for abuse of discretion, the appellate court gives deference to the trial court, which, when ruling on punitive damages, "sits not in an appellate capacity, but as an independent trier of fact" – or a 13th juror. *Neal*, 21 Cal.3d at 933. The appellate court in this case subscribed to that deferential view, adopting *Neal*'s dictate that the trial judge's order "not be reversed unless it plainly appears that he abused his discretion." *See* Pet. App. 28a.

A far more active role is contemplated for appellate courts under de novo review of constitutional excessiveness – "a legal issue appellate courts determine

independently." *Simon*, 35 Cal.4th at 1187. *Simon* itself, however, undercuts that broad pronouncement by requiring an appellate court to "keep in mind . . . that its constitutional mission is only to find a level higher than which an award *may not* go; it is not to find the 'right' level in the court's own view." *Id.* at 1188. "In enforcing federal due process limits, an appellate court *does not sit as a replacement for the jury* but only as a check on arbitrary awards." *Id.* at 1188 (emphasis added).

Differing standards of review are not only unjust to parties, they create confusion for appellate courts. When it comes to punitive damages, appellate courts in California are sent mixed signals as to whether they are to merely guard against trial court abuse of discretion, whether they are to independently determine excessiveness under due process considerations, or whether they are charged with ascertaining constitutionally permissible maximums. Certiorari is warranted on this issue so that appellate courts may be afforded definitive guidance in their review of punitive damages.

CONCLUSION

Despite several rulings from this Court regarding proper constitutional analysis of punitive damages, the California Supreme Court retains an alternate test, which utilizes different substantive criteria, adheres to a deferential standard of review, and is incorrectly applied to cases, including Petitioner's, yielding inconsistent results. This Court is respectfully asked to grant certiorari to resolve a key conflict between its rulings and those of the California Supreme Court in order to promote uniformity and consistency in an important area of law, punitive damages.

Respectfully submitted,

AREVA D. MARTIN
Counsel of Record
ARAM KOUYOUMDJIAN
MARTIN & MARTIN, LLP
Attorneys for Petitioner
3530 Wilshire Boulevard
Suite 1650
Los Angeles, CA 90010
(213) 388-4747

APPENDIX

APPENDIX A — OPINION OF THE COURT OF APPEAL OF CALIFORNIA, SECOND APPELLATE DISTRICT, DIVISION SIX FILED JANUARY 20, 2009 AND MODIFIED FEBRUARY 18, 2009

COURT OF APPEAL OF CALIFORNIA, SECOND APPELLATE DISTRICT, DIVISION SIX

No. B196755, No. B201528

JAMES STEVENS,

Plaintiff, Respondent, and Cross-Appellant,

v.

VONS COMPANIES,

Defendant, Respondent, and Cross-Complainant.

January 20, 2009, Filed

OPINION

James Stevens, respondent, brought an action against the Vons Companies, Inc., appellant, alleging sexual harassment and retaliation in violation of the California Fair Employment Housing Act (FEHA). (Gov.Code, § 12900 et seq.) Appellant appeals from that portion of the judgment awarding respondent punitive

damages. It contends that punitive damages are unwarranted because the evidence is insufficient to establish that a managing agent of the corporation ratified or engaged in oppressive or malicious conduct. Appellant also appeals from an order awarding respondent attorney fees. It contends that the trial court erroneously applied a multiplier to the lodestar calculation of attorney fees. Respondent cross-appeals from the judgment, challenging a conditional new trial order that reduced the jury's award of punitive damages ($16,729,880) by way of remittitur. We affirm the judgment which awards respondent Stevens $1.2 million in compensatory damages, $1.2 million punitive damages, $300,709.50 to the Allred law firm and $343,265.60 to the Davis law firm.

Factual and Procedural Background

In 2002 respondent was employed by appellant as the inventory control clerk (ICC) at store 2047 in Simi Valley. His main responsibility was to account for all goods delivered to the store through the back door. Respondent had continuously worked for appellant since July 1978.

In August 2002 respondent complained to appellant that Laura Marko, the general merchandise manager at store 2047, was sexually harassing him. Diana Lovan and Jenny McGroggan of Appellant's Human Resources Department (HRD) investigated the matter and prepared a report dated September 20, 2002.

Appendix A

According to the report, respondent claimed, "Laura Marko is telling people in the store that I am . . . calling her at home, that I am making inappropriate comments and that I am a pervert." Respondent declared that "he has been conducting his own investigation so he can litigate." Respondent told Lovan that seven employees had said that they had heard Marko make inappropriate sexual comments.

Lovan and McGroggan interviewed six employees in addition to respondent and Marko. Five employees said that Marko had made inappropriate sexual comments. Two employees said that Marko had made these comments in the presence of Paul Barron, the assistant store manager. One of the employees, Rachel Bean, described Barron's reaction to the comments as follows: "Paul gets all embarrassed and walks away."

Bean was the only employee interviewed by Logan and McGroggan who said that Marko had made sexual comments relating to respondent: "[Marko] told me that she has complained about [respondent] making a sexual comment to her. I thought it was a joke and made a comment to [respondent] and he took it very seriously. He said that he never did anything and he seemed upset about it."

Lovan and McGroggan concluded that respondent's allegations of sexual harassment by Marko were unsubstantiated. They recommended that both respondent and Marko be transferred to different stores. Their report noted that "it was operationally

feasible to move [respondent] immediately due to an opening at [store] 3080 for ICC." However, "[i]t was operationally not possible for time being to move [Marko]."

The report states that HRD informed respondent that his allegations were "not substantiated." Respondent was also informed that both he and Marko would be transferred, but "his move would be immediate due to operational feasibility." HRD "explained [to respondent] that due to the fact that [he] investigated this issue prior to reporting it to company representatives, environment at store has been disrupted and many employees are uncomfortable." HRD further "explained that [respondent's] complaint was valid and should have been addressed by company only." [1]

Lovan and McGroggan reported to Jean Guillen, the retail store manager of HRD. Guillen testified, "There was no doubt Laura Marko made sexual comments in the store that were extremely inappropriate."

In September 2002 William Tarter transferred respondent to store 3080 in Simi Valley. Tarter was one

1. HRD's statement to appellant that his "complaint was valid" appears to conflict with its conclusion that his allegations were "not substantiated." HRD may have intended to say that, although appellant had validly claimed that Marko was making inappropriate sexual comments, there was insufficient evidence to show that these comments constituted sexual harassment of him.

of appellant's 17 district managers. He was responsible for 20 stores in Ventura County District 42, including stores 2047 and 3080. Tarter testified that he had transferred respondent pursuant to HRD's recommendation.

Marko was not disciplined for her conduct, nor was she transferred to another store. HRD told her that she was going to be transferred for "safety reasons." But she "refused to be transferred, . . . [she] told them that [she] would rather quit." Marko remained at store 2047 until her resignation in September 2003. No one ever told her that she "had acted inappropriately in any manner, shape or form."

Tarter was aware that several witnesses had said Marko "had engaged in inappropriate sexual behavior in their presence." He wanted to transfer Marko, but "there was not . . . an appropriate facility to move [her] to." According to Tarter, he was not involved in disciplining Marko: this was HRD's responsibility.

In November 2002 respondent filed an administrative complaint of discrimination with the Department of Fair Employment and Housing (DFEH). Respondent claimed that he had been transferred to store 3080 in retaliation for complaining about Marko's sexual harassment.

In April 2003 Tarter and McGroggan met with Barron, the assistant manager of store 2047, and issued him a written warning for his failure "to take an

appropriate level of corrective action in response" to Marko's sexual comments.

In November 2003 the DFEH determined that there was no probable cause to prove a FEHA violation. An HRD employee subsequently wrote a memorandum to Barron and Marko notifying them of the DFEH's action. The memorandum ended with the following sentence, "Congratulations on this favorable finding." A copy of the memorandum was sent to Tarter.

Starting in October 2003, respondent participated in a union-organized strike of appellant. During the strike, respondent wrote a letter to the Securities and Exchange Commission complaining that Steven Burd, the chief executive officer of appellant's parent company (Safeway), had violated the laws relating to insider trading. Tarter read the letter.

The strike ended at the beginning of March 2004, and respondent returned to work. On March 30, 2004, respondent was suspended for violating appellant's policy concerning the donation of store goods to charities. Pursuant to that policy, respondent was allowed to donate stale bread out of the back door of the store. The policy did not forbid the donation of direct store distributor (DSD) products that had been damaged or had an expired date code, provided that the vendor credited appellant for the items and consented to their donation. The DSD vendors delivered directly to the stores in their own trucks. Other unsold goods - national brands delivered in appellant's trucks

and appellant's private label products - could not be donated to charity. If any of these items were damaged or had an expired date code, respondent was required to return them to the Product Recovery Center (PRC).

In store 3080, the DSD donations were kept in banana boxes under a sign that said, "Donations." The DSD salesmen would place damaged and expired products in these boxes after they had credited appellant for the items. When a box was full, a salesman would usually close it. Respondent neither packed the boxes nor monitored the donations. In a separate area next to the boxes with DSD donations, respondent stacked banana boxes containing damaged and expired non-DSD products, such as private label bottled water, that were to be returned to the PRC.

Representatives from various charities would come in the morning to collect the donations on a first-come, first-served basis. In the morning on March 30, 2004, Sam Smith came to store 3080 to collect donations for Grace Brethren Church. He had been collecting donations from appellant's stores for "at least 10 to 15 years." According to Smith, he picked up three banana boxes under the "Donations" sign, loaded them into a shopping cart, and wheeled the cart to his car.

Patricia Velarde saw Smith putting the banana boxes into his car. (10RT 2086-2087) She had been assigned to a different store, but was helping out for three to four weeks as a supervisor at store 3080. On prior occasions, she had seen respondent make donations of banana

boxes containing store products. Velarde believed that these donations were improper. She had informed Sheila Flanagan, the store manager, who had told her, "We all know that's called stealing."

After observing Smith's actions on March 30, 2004, Velarde telephoned Flanagan at home and informed her that "salable product was going out the back door." Flanagan told Velarde to retrieve the banana boxes and to hold them until she arrived. Velarde did as she was told. She put the boxes on a dolly, which she wheeled back inside the store.

Flanagan telephoned Scott Guillen, appellant's loss prevention representative for District 42. Guillen, in turn, telephoned Tarter and "said he was going to go by the store and document exactly what the violation was that took place . . . ."

Upon arriving at the store, Guillen opened the banana boxes retrieved by Velarde. According to Guillen, there were six boxes containing private label merchandise, including bottled water, that was required to be returned to the PRC. Guillen suspended respondent for violating appellant's donation policy. He then telephoned Tarter and informed him of the suspension. Tarter "thanked" Guillen. Tarter could have revoked the suspension, but he decided that it was appropriate.

Guillen testified that, until September 2003, appellant's policy had permitted private label donations

to charity. In September 2003 a new policy went into effect prohibiting such donations. Guillen was mistaken: private label donations had always been prohibited.

Guillen wrote a report, which states as follows: "On 03-25-04, I was contacted by supervisor Patty Velarde . . . who told me that she had just been told by the porter — Francisco Hernandez, that a man was regularly showing up at around 0500hrs, and that the ICC ([respondent]) would, 'Fill up this guy's car with stuff from the PRC area, and then the guy would leave'. On 3-30-04 at 0800hrs, I was contacted by Store Mgr. Sheila Flanagan, who told me that Velarde had personally observed PRC product in several banana boxes being placed into the back of a vehicle by a man who had pulled up to the receiving dock area. This was being done in the presence of the ICC, [respondent]. Velarde called Flanagan, who instructed Velarde to ask for the product back. Velarde approached the man . . . and requested the product back 'until the store mgr. could verify it'. The . . . man agreed, and unloaded 6 banana boxes full of product out of the vehicle. At this time, [respondent] approached Velarde and asked, 'What was going on'. [Respondent] told Velarde that, 'Sheila (Store Mgr) had ok'd it a long time ago.' (This was adamently [*sic*] denied by Flanagan). At 0945 hrs, I met Flanagan at Store # 3080 and walked to the receiving area. Once in the backroom, I saw [respondent] speaking with another employee. . . . During the course of the interview [with respondent, he] told me that the man who has been picking up the product is from the 'Grace Brethren Community church', and that he ([respondent]) has been

giving private label product besides bread to this church regularly since before the strike'. . . . [Respondent] then stated that he, 'was unaware that he could not donate private label product, and that that is how we've always done it, and that he must have not gotten the memo on the change'. I reminded [respondent] that the change had occurred in July 03, and that it was to be in place by 09-03 (we send Private Label product back to PRC for credit, if it is donated, we lose the credit, causing losses to the company). [Respondent] then said, 'The way the store's used to do it we were allowed to donate private label items, and now the store loses money on it'. The 6 banana boxes full of product [respondent] was donating contained several items, including 10 pkgs of Safeway Select Whole Coffee Beans . . . and multiple cases of Safeway water, one of which was a full unbroken case. I asked [respondent] why we were not placing the separate containers of water into the cooler on the floor and selling them, as per policy. [Respondent] told me that the cooler, 'was always broken'. (I later took digital pictures of the functioning cooler where the store sells this water). . . . I then placed [respondent] on immediate suspension pending further investigation by Loss Prevention. When the product wa[s] scanned; the total came to $76.72."

Guillen reported the results of his investigation to Gregg Rutkin, appellant's labor relations manager. It was Rutkin's responsibility to make a recommendation to Tarter concerning the discipline to be administered to respondent. Rutkin was very concerned that the banana boxes contained private label water "because

we don't donate that water." Rutkin recommended that respondent be fired.

Based on Guillen's report and Rutkin's recommendation, Tarter decided to fire respondent. Tarter concluded that respondent "had deliberately given product away that he knew he shouldn't give away." He believed that respondent's actions could not have been the result "of some mixup." Tarter did not contact respondent before firing him, nor did he discuss the matter with any of the witnesses mentioned in Guillen's report. Tarter was aware that this was respondent's first violation of policy during his 26 years of employment with the company. Tarter was also aware that, in respondent's January 2002 job evaluation, he had received the highest possible overall rating: "exceptional." Tarter admitted that there was no evidence linking respondent to the charity that had picked up the donation on March 30, 2004.

Respondent testified that, in the morning on March 30, 2004, he saw Smith at the store but did not see him remove any boxes. Guillen arrived and interviewed respondent for about 10 minutes. Guillen questioned him about the donations policy and asked why private label bottled water was in boxes. At the time, respondent believed that Guillen was referring to bottled water that was being returned to the PRC. Guillen never said that Smith had taken boxes containing private label bottled water. Respondent did not tell Guillen that he had been donating private label products. He knew that such products were required to be returned to the PRC. At

the conclusion of the interview, Guillen said that respondent "was suspended pending further investigation." Guillen did not inform him why he was being suspended. Guillen did not give respondent a copy of his report, and respondent did not obtain a copy until discovery during litigation. When respondent filed his lawsuit against appellant, he did not know what was in the report.

Jury Verdict

The jury returned a special verdict. The jury found: (1) Marko had sexually harassed respondent; (2) in relation to that harassment, appellant "was guilty of oppression, malice or despicable conduct," (3) a "managing agent" (Tarter) employed by appellant had committed, authorized, or ratified the sexual harassment; (4) respondent's resulting noneconomic loss was $500,000; (5) respondent's complaint to appellant of sexual harassment was not "a motivating reason" for his transfer to store 3080; (6) however, his complaints to appellant and the DFEH were "a motivating reason" for his termination resulting in a $1,000,000 noneconomic loss to respondent; (7) in relation to respondent's termination, appellant "was guilty of oppression, malice or despicable conduct"; (8) a "managing agent" (Tarter) employed by appellant had committed, authorized, or ratified the retaliatory termination; (9) although appellant's conduct was "extreme and outrageous," it had not intended to cause respondent "emotional distress"; and (10) respondent's

economic and noneconomic losses for the retaliatory termination were respectively $172,988 and $1 million.

In a separate verdict the jury awarded respondent punitive damages of $16,729,880.

Motion for New Trial

The trial court granted appellant's motion for a new trial on the ground of excessive compensatory and punitive damages. The court found that the $500,000 non-economic damages award for sexual harassment was excessive because "[t]here was no evidence that [respondent] . . . had any physical manifestations or [had] suffered anything other than minimal emotional distress." The court found that the noneconomic damages award of $1,000,000 for the retaliatory termination, while "quite high," was not "excessive in light of the extreme psychological effect the termination had on [respondent]. He stopped functioning as a productive member of society, became withdrawn and saw his marriage fall apart."

Pursuant to Code of Civil Procedure section 662.5, subdivision (b), the court declared that its granting of appellant's new trial motion was subject to the condition that the motion would be denied if respondent agreed "to remit all sums in excess of $1,200,000 compensatory damages . . . and $1,200,000 punitive damages." Respondent accepted the remittitur.

Appendix A

APPELLANT'S APPEAL

Punitive Damages: Standard of Review

"The civil law is normally concerned with compensating victims for actual injuries sustained at the hands of a tortfeasor. Punitive damages are an exception to this rule. Since 1872, they have been statutorily authorized in actions 'not arising from contract' where the tortious event involves an additional egregious component — 'oppression, fraud, or malice.' (Civ.Code, § 3294, subd. (a).)" (*College Hospital Inc. v. Superior Court* (1994) 8 Cal.4th 704, 712.) The "oppression, fraud, or malice" must be "proven by clear and convincing evidence." (Civ. Code, § 3294, subd. (a).)

"[T]he jury award of punitive damages must be upheld if it is supported by substantial evidence. [Citation.] . . . [W]e are bound to 'consider the evidence in the light *most favorable to the prevailing party*, giving him the benefit of *every reasonable inference*, and *resolving conflicts* in support of the judgment.' [Citation.] But since the jury's findings were subject to a heightened burden of proof, we must review the record in support of these findings in light of that burden. In other words, we must inquire whether the record contains 'substantial evidence to support a determination by clear and convincing evidence . . . .' [Citation.]" (*Shade Foods, Inc. v. Innovative Products Sales & Marketing, Inc.* (2000) 78 Cal.App.4th 847, 891.)

Appendix A

Punitive Damages: Managing Agent

"An employer shall not be liable for damages pursuant to subdivision (a) [of Civil Code section 3294], based upon acts of an employee of the employer, unless the employer . . . authorized or ratified the wrongful conduct for which the damages are awarded or was personally guilty of oppression, fraud, or malice. With respect to a corporate employer, the . . . authorization, ratification or act of oppression, fraud, or malice must be on the part of an officer, director, or *managing agent* of the corporation." (Civ. Code, § 3294, subd. (b), italics added.)

Respondent contends that appellant's liability for punitive damages arises from Tarter's actions as a managing agent of the corporation. "[T]he Legislature intended the term 'managing agent' to include only those corporate employees who exercise substantial independent authority and judgment in their corporate decision-making so that their decisions ultimately determine corporate policy. The scope of a corporate employee's discretion and authority . . . is . . . a question of fact for decision on a case by case-by-case basis." (*White v. Ultramar, Inc.* (1999) 21 Cal.4th 563, 566-567 (*White*).)

In *White* the employee in question was a "zone manager" for the company. She supervised "a significant aspect of [the company's] business": eight stores and at least sixty-five employees. (*White*, *supra*, 21 Cal.4th at p. 577.) "The individual store managers reported to

her, and [she] reported to department heads in the corporation's retail management department." (*Ibid.*) The zone manager's superiors "delegated most, if not all, of the responsibility for running [the eight] stores to her." (*Ibid.*) Our Supreme Court concluded that the zone manager qualified as a managing agent: "[She] exercised substantial discretionary authority over vital aspects of [the company's] business that included managing numerous stores on a daily basis and making significant decisions affecting both store and company policy. In firing [the plaintiff] for testifying at an unemployment hearing, [she] exercised substantial discretionary authority over decisions that ultimately determined corporate policy in a most crucial aspect of [the company's] business." (*Id.*, at pp. 577.)

"[V]iewing all the facts in favor of the trial court judgment," we conclude that the record contains substantial evidence to support a determination by clear and convincing evidence that Tarter was a managing agent. (*White, supra*, 21 Cal.4th at p. 577.) As one of appellant's 17 district managers, Tarter supervised "a significant aspect of [the company's] business": 20 stores in Ventura County. (*Ibid.*) He was the highest ranking company official in his district, and all of the store managers in the district reported to him. Tarter, in turn, reported to the regional operations manager. He was "responsible for overseeing all the stores in [his] district, including overseeing all personnel issues involving employees within [his] district." He had the power to transfer, suspend, and fire employees within his district. "In firing [respondent] for [his complaints

of sexual harassment, Tarter] exercised substantial discretionary authority over decisions that ultimately determined corporate policy in a most crucial aspect of [the company's] business." (*Id.*, at pp. 577-578.)

Punitive Damages: Sexual Harassment

Respondent's claim of punitive damages for sexual harassment was based on Tarter's alleged ratification of Marko's sexual misconduct. During closing argument, respondent's counsel declared: "The way [appellant] conducted this investigation, the way they allowed Ms. Marko to stay there, the way they didn't discipline her in any way, that's what constitutes the malicious, despicable conduct." "[A]fter [Tarter] knew about all of the things that Ms. Marko did, he left her there. And he admitted in his trial testimony that she was free to do whatever she wanted. That's the essence of ratification."

"For purposes of determining an employer's liability for punitive damages, ratification generally occurs where, under the particular circumstances, the employer demonstrates an intent to adopt or approve oppressive, fraudulent, or malicious behavior by an employee in the performance of his job duties. [¶] The issue commonly arises where the employer or its managing agent is charged with failing to intercede in a known pattern of workplace abuse, or failing to investigate or discipline the errant employee once such misconduct became known. [Citations.]" (*College Hospital Inc. v. Superior Court*, *supra*, 8 Cal.4th at p. 726.)

"'Ratification is a question of fact. The burden of proving ratification is upon the party asserting its existence. But ratification may be proved by circumstantial as well as direct evidence. Anything which convincingly shows the intention of the principal to adopt or approve the act in question is sufficient.' (Citations omitted.) [Citations.]" (*Greenfield v. Spectrum Investment Corp.* (1985) 174 Cal.App.3d 111, 118, overruled on other grounds in *Lakin v. Watkins Associated Industries* (1993) 6 Cal.4th 644, 664.)

The record contains substantial evidence from which a reasonable trier of fact could find by clear and convincing evidence that Tarter ratified Marko's sexual harassment. Although Tarter knew that Marko had engaged in inappropriate sexual conduct, she was neither disciplined nor reprimanded. The report by HRD recommended that both Marko and respondent be transferred to another store, but Tarter transferred only respondent. After respondent's transfer, Marko remained at store 2047 for approximately one year until her resignation in September 2003. No one ever told Marko that she "had acted inappropriately in any manner, shape or form."

An employer's failure to discipline or reprimand an employee for known misconduct may reasonably be construed as a ratification of that misconduct. "'[R]atification may be inferred from the fact that the employer, after being informed of the employee's actions, does not fully investigate and fails to repudiate the employee's conduct by redressing the harm done and

punishing or discharging the employee. [Citations.]' [Citation.]" (*Fisher v. San Pedro Peninsula Hospital* (1989) 214 Cal.App.3d 590, 621; see also *Murillo v. Rite Stuff Foods, Inc.* (1998) 65 Cal.App.4th 833, 852; *Hart v. National Mortgage & Land Co.* (1987) 189 Cal.App.3d 1420, 1430; *Greenfield v. Spectrum Investment Corp., supra*, 174 Cal.App.3d at p. 121; *Sandoval v. Southern Cal. Enterprises, Inc.* (1950) 98 Cal.App.2d 240, 250.)

We recognize that, according to Tarter, it was HRD's responsibility to discipline Marko. But the jury could have reasonably concluded that primary responsibility lay with Tarter. He testified that he was "responsible for . . . overseeing all personnel issues involving employees within [his] district" and that he had "the authority to take disciplinary action when a Vons employee violated company policy." In April 2003 Tarter met with Barron, the assistant manager of store 2047, and issued him a written warning for his failure "to take an appropriate level of corrective action in response" to Marko's misconduct, which was "in violation of the company's Policy Against Sexual Harassment in the Workplace." But Tarter did not bother to assure that a warning was issued to the perpetrator of the sexual misconduct, who remained at store 2047. Without such a warning, there was a danger that Marko would continue to engage in sexually inappropriate conduct.

Punitive Damages: Tarter's Firing of Respondent

Respondent claims that Tarter's conduct was oppressive and malicious because he conspired with

Guillen to falsely accuse respondent of violating the donation policy so that he would have grounds to fire respondent: "When [respondent] returned to work from the strike in March 2004, Tarter seized his first opportunity to retaliate against [respondent.]" ". . . Tarter and Guillen determined before any investigation to use the donation incident as the pretext for firing [respondent]." ". . . Tarter retaliated against [respondent] by having [him] falsely accused of violating Vons' product-donation policy . . . as a pretext to fire Stevens." "Tarter used investigator Scott Guillen to frame [respondent] by charging him with violating the donation policy . . . ."

We need not decide whether the evidence supports the existence of such a conspiracy. The record contains substantial evidence from which a reasonable trier of fact could find by clear and convincing evidence that (1) Tarter fired respondent in retaliation for his complaints of sexual harassment, and (2) Tarter relied on respondent's alleged violation of the donation policy as a pretext to justify the firing. Such conduct by Tarter constitutes sufficient evidence of oppression and malice to support an award of punitive damages under Civil Code section 3294.

Tarter knew that respondent "was doing an exceptional job" for appellant. In a 2002 job evaluation, respondent had received "the highest overall rating that anyone could get in his job category." Tarter also knew that this was the first time in respondent's 26 years of employment by appellant that he had violated company

policy. Nevertheless, he chose to terminate respondent for an alleged policy violation involving the donation of private label goods with a retail value of $76.72. Tarter testified that he had concluded that respondent "had deliberately given product away that he knew he shouldn't give away." But the jury could have, and did, reasonably reject this explanation. Guillen's report did not show that respondent's violation of the donation policy was deliberate. According to the report, respondent said that he was unaware of company policy prohibiting the donation of damaged or out-of-date private label products. Nothing in the report indicated that respondent was stealing from appellant or that he stood to benefit from the donation to Grace Brethren Church. Tarter admitted that there was no "direct evidence" of any connection between respondent and the charity.

Moreover, Tarter fired this exceptional and longstanding employee without contacting him or giving him an opportunity to refute Guillen's allegations. Respondent testified that he did not obtain a copy of Guillen's report until discovery during litigation. Prior to that time, he did not know what was in the report. Nor did Tarter verify the accuracy of Guillen's allegations by contacting any of the witnesses mentioned in the report. Although the report said that statements had been obtained from the witnesses, no statements were attached to the report. Guillen testified that he had not obtained written statements from anyone.

Viewing the evidence in the light most favorable to respondent, giving him the benefit of every reasonable inference, and resolving conflicts in support of the judgment, we conclude that the jury could have reasonably determined, by clear and convincing evidence, that Tarter did not fire respondent because of the policy violation as documented by Guillen. Instead, Tarter fired respondent because he considered him to be a troublemaker who had created problems for appellant by his complaints of sexual harassment.

Attorney Fees

"'[T]he fee setting inquiry in California ordinarily begins with the "lodestar," i.e., the number of hours reasonably expended multiplied by the reasonable hourly rate. . . . The lodestar figure may then be adjusted, based on consideration of factors specific to the case, in order to fix the fee at the fair market value for the legal services provided. [Citations.]'" (*Ketchum v. Moses* (2001) 24 Cal.4th 1122, 1134.)

Appellant does not challenge the lodestar figures arrived at by the trial court. It argues that the multipliers applied to the lodestar figures "should be eliminated." For the attorneys from the firm of Allred, Maroko & Goldberg, the court applied a multiplier of 1.4 to the lodestar figure of $214,792.50, so that attorney fees totaled $300,709.50. For the attorneys from the firm of Davis*Gavsie, the court applied a multiplier of 1.6 to the lodestar figure of $214,541, so that attorney fees totaled $343,265.60.

Appendix A

In selecting the multipliers, the trial court took into account the following factors: (1) the difficulty of the case, (2) the contingent nature of the fee arrangement, (3) the delay in payment to Davis*Gavsie, and (4) the outstanding results obtained. We review the court's ruling under the deferential abuse of discretion standard. (*Horsford v. Board of Trustees of California State University* (2005) 132 Cal.App.4th 359, 393.) "'The "'experienced trial judge is the best judge of the value of professional services rendered in his court, and while his judgment is of course subject to review, it will not be disturbed unless the appellate court is convinced that it is clearly wrong.'" [Citation.]" *Graham v. DaimlerChrysler Corp.* (2004) 34 Cal.4th 553, 579.)

Appellant contends that the trial court abused its discretion in applying a multiplier to the lodestar figures because (1) the lawsuit vindicated respondent's personal rights and did not benefit the public; (2) the contingent nature of the fee arrangement did not justify a multiplier; (3) the trial court took the difficulty of the case into account when it calculated the lodestar amounts; (4) the results obtained "actually 'militate *against* enhancing the fee award'"; (RB 40) and (5) the delay in payment to Davis*Gavsie is "inherent in any contingency-fee practice" and therefore is "not a basis for a multiplier."

The trial court did not abuse its discretion. The use of a multiplier is permitted in FEHA cases even though the action "was brought not to benefit the public, but as a means of vindicating [the plaintiff's] own personal

rights and economic interest." (*Weeks v. Baker & McKenzie* (1998) 63 Cal.App.4th 1128, 1170-1171, 1172; accord, *Flannery v. California Highway Patrol* (1998) 61 Cal.App.4th 629, 646-647.)

In determining whether to apply a multiplier, the trial court may consider the contingent nature of the fee arrangement. (*Ketchum v. Moses*, *supra*, 24 Cal.4th 1122, 1132-1133; *Greene v. Dillingham Construction, N.A., Inc.* (2002) 101 Cal.App.4th 418, 428-429 ["in *Ketchum* . . . the Supreme Court has reaffirmed that contingent risk is a valid consideration in determining whether to apply a fee enhancement in cases where attorney fees are authorized by statute"].) The trial court may also consider the difficulty of the case in calculating the lodestar amount. "In FEHA cases, the trial court has the discretion to apply a multiplier or fee enhancement to the lodestar figure to take into account . . . the novelty and difficulty of the issues presented . . . . [Citations.]" (*Greene v. Dillingham Construction, N.A., Inc.*, *supra*, 101 Cal.App.4th at pp. 426-427.)

We reject appellant's contention that the results obtained "actually 'militate *against* enhancing the fee award.'" The attorneys obtained a $2.4 million award for their client, an inventory control clerk whose rate of pay in 2002 was approximately $750 per week. "'The "results obtained" factor can properly be used to enhance a lodestar calculation where an exceptional effort produced an exceptional benefit.' [Citation.]" (*Graham v. DaimlerChrysler Corp.*, *supra* 34 Cal.4th at p. 582.)

We also reject appellant's contention that the delay in payment to Davis*Gavsie is "inherent in any contingency-fee practice" and therefore is "not a basis for a multiplier." (RB 41) In its ruling, the trial court made it clear that the contingency fee factor was based on the risk of nonpayment if the attorneys lost at trial. The delay in payment factor, on the other hand, was based on the almost three-year delay between the commencement of work on the case by Davis*Gavsie and the trial court's ruling awarding attorney fees. "One enhancement factor that would be . . . applicable . . . is a significant delay in the payment of the fees. [Citation.] 'Court-awarded fees normally are received long after the legal services are rendered. That delay can present cash-flow problems for the attorneys. In any event, payment today for services rendered long in the past deprives the eventual recipient of the value of the use of the money in the meantime, which use, particularly in an inflationary era, is valuable. A percentage adjustment to reflect the delay in receipt of payment therefore may be appropriate.' [Citation.]" (*Graham v. DaimlerChrysler Corp.*, *supra*, 34 Cal.4th at pp. 583-584.)

For the first time in its reply brief, appellant argues that the trial court abused its discretion in enhancing Davis's lodestar amount for delay in payment because the court used the attorney's current hourly rate in calculating that amount. An enhancement for delay in payment "may be reduced or eliminated if the lodestar

rate is based on the present hourly rate rather than the lesser rate applicable when the services were rendered. [Citations.]" (*Graham v. DaimlerChrysler Corp.*, *supra* 34 Cal.4th at p. 584.)

This argument is waived because it was not asserted in appellant's opening brief. (*Mejia v. City of Los Angeles* (2007) 156 Cal.App.4th 151, 159, fn. 5.) In any event, the argument is without merit because appellant has not shown that the lodestar calculation was "based on the present hourly rate rather than the lesser rate applicable when the services were rendered." (*Graham v. DaimlerChrysler Corp.*, *supra*, 34 Cal.4th at p. 584.) Appellant notes that Davis received $300 per hour for her pre-trial work, but it does not cite any evidence indicating that her hourly rate was less than $ 300 when the pre-trial services were rendered.

RESPONDENT'S CROSS-APPEAL

The Trial Court Did Not Abuse Its Discretion in Reducing Punitive Damages

The jury awarded $1,672,988 in compensatory damages and $16,729,880 in punitive damages. Respondent accepted a remittitur reducing compensatory damages to $1,200,000 and punitive damages to the same amount. In his cross-appeal, respondent challenges only the remittitur of punitive damages. He contends that the trial court erroneously reduced punitive damages to an amount that it considered fair and reasonable. Instead, the court

should have reduced punitive damages to the maximum constitutionally permissible award. Respondent alleges: "[D]ue process does not allow reducing punitive damages below the constitutional maximum." (RB 73) "The trial court was not at liberty to choose the amount of punitive damages that suited the trial judge." Respondent relies on *Simon v. San Paolo U.S. Holding Co., Inc.* (2005) 35 Cal.4th 1159: "[T]he trial court . . . [failed] to fulfill its constitutional duty under *Simon* to find the highest constitutionally-permissible award of punitive damages while giving appropriate deference to the jury's findings of historical fact in its verdict against [appellant]."

Respondent argues that the punitive damages awarded by the jury - $16,729,880 - falls within the maximum constitutionally permissible award. (Cross-Appellant's Reply Brief 14) He requests that "the jury award . . . be reinstated, or, in the alternative, [that] the punitive damages award . . . be increased to the absolute constitutional maximum."

Respondent's reliance on *Simon* is misplaced. *Simon* did not hold that when a trial court orders a remittitur of punitive damages its authority is limited to reducing the award to the absolute constitutional maximum. In *Simon* the judgment awarded plaintiff $5,000 in compensatory damages and $1.7 million in punitive damages. Our Supreme Court concluded that the punitive damages award "exceeds the federal due process limitations outlined in recent United States Supreme Court decisions." (*Simon v. San Paolo U.S. Holding Co., Inc., supra*, 35 Cal.4th at p. 1166.) It

reduced the award to "the maximum award constitutionally permissible in the circumstances of this case": $50,000. (*Ibid.*)

The *Simon* court noted that its "decision . . . addresses only the federal constitutional question, not any issue of excessiveness under California law." (*Simon v. San Paolo U.S. Holding Co., Inc., supra*, 35 Cal.4th at p. 1167.) The controlling authority for excessiveness under California law is *Neal v. Farmers Ins. Exchange* (1978) 21 Cal.3d 910. The *Neal* court observed that, when the plaintiff challenges a conditional new trial order remitting the amount of punitive damages, the question is "whether the challenged order . . . lacked substantial support in the record." (*Id.*, at p. 932.) The *Neal* court went on to state: "In addressing this question we are guided by certain basic principles. The first is that when a trial court grants a new trial on the issue of excessive damages, whether or not such order is conditioned by a demand for reduction, the presumption of correctness normally accorded on appeal to the jury's verdict is replaced by a presumption in favor of the order. . . . '[The trial judge's] order will not be reversed unless it plainly appears that he abused his discretion; and the cases teach that when there is a material conflict of evidence regarding the extent of damage the imputation of such abuse is repelled, the same as if the ground of the order were insufficiency of the evidence to justify the verdict.' [Citations.] The reason for this is that the trial court, in ruling on the motion, sits not in an appellate capacity but as an independent trier of fact." (*Id.*, at pp. 932-933.)

Appendix A

The trial court's role as an independent "fact finder is conferred . . . by Code of Civil Procedure section 662.5 which provides that if a new trial limited to the issue of damages would be proper after a jury trial, 'the trial court may in its discretion: . . . (b) If the ground for granting a new trial is excessive damages, make its order granting the new trial subject to the condition that the motion for a new trial is denied if the party in whose favor the verdict has been rendered consents to a reduction of so much thereof as the court *in its independent judgment determines from the evidence to be fair and reasonable.*' (Italics supplied.)" (*Grimshaw v. Ford Motor Co.* (1981) 119 Cal.App.3d 757, 823.)

Thus, the issue here is whether, in the exercise of its independent judgment, the trial court abused its discretion by reducing punitive damages to the same amount as compensatory damages: $1.2 million. We will reverse the court's order only if the record is devoid of any substantial basis supporting the remittitur. In determining whether a substantial basis exists, "the trial court's factual determinations . . . are entitled to the same deference that an appellate court would ordinarily accord a jury's factual determinations." (*Lane v. Hughes Aircraft Co.* (2000) 22 Cal.4th 405, 412.)

The trial court's reasons for reducing the amount of punitive damages were as follows:

(1) "[T]he amount of punitive damages awarded was a result of passion and prejudice on the part of the jury."

In support of this finding, the trial court noted that respondent's counsel had asked for an award equal to six times the amount of compensatory damages, but "[t]he jury awarded ten times the amount."

(2) Although respondent was "financially vulnerable" and appellant's "conduct involved intentional trickery or deceit," the "degree of reprehensibility was low to moderate" because "[t]he harm caused was not physical, the conduct did not involve indifference to or reckless disregard of health or safety and there was no evidence the conduct was other than an isolated incident." [2]

(3) "The relationship between compensatory and punitive damages would weigh in favor of a lower level of [punitive] damages," since "the amount of compensatory damages awarded for the sexual harassment is excessive."

---

2. "'We have instructed courts to determine the reprehensibility of a defendant by considering whether: the harm caused was physical as opposed to economic; the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others; the target of the conduct had financial vulnerability; the conduct involved repeated actions or was an isolated incident; and the harm was the result of intentional malice, trickery, or deceit, or mere accident.' [Citation.]" (*Simon v. San Paolo U.S. Holding Co., Inc., supra*, 35 Cal.4th at p. 1180, quoting from *State Farm Mut. Auto Ins. Co. v. Campbell* (2003) 538 U.S. 408, 419 [123 S.Ct. 1513, 155 L.Ed.2d 585].)

(4) "Based upon the evidence at trial, the amount awarded for the retaliation is sustainable, but quite high, and the Court believes [it] contains an element of punishment."

(5) "The parties agree that [the] maximum civil penalty in this case would be $150,000. A punitive damage[s] award that is over 111 times the maximum civil penalty is not proportionate."

The trial court did not abuse its discretion. The evidence was in conflict, and the jury found that appellant had not intended to cause respondent "emotional distress." **[Although respondent testified that "a couple" of employees had been terminated and "a couple" had been forced to quit for making complaints, he did not provide any actual example of such occurrences.]** It was reasonable for the trial court to conclude, as an independent trier of fact, that the "degree of reprehensibility [of appellant's conduct] was low to moderate," justifying no more than a 1:1 ratio of compensatory to punitive damages. "'[T]he most important indicium of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant's conduct.' [Citations.]" (*Simon v. San Paolo U.S. Holding Co., Inc., supra*, 35 Cal.4th at p. 1180.)

The reasonableness of the trial court's selection of a 1:1 ratio is supported by *Exxon Shipping Co. v. Baker* (2008) __ U.S. __ [128 S.Ct. 2605, 171 L.Ed.2d 570]. In that case the United States Supreme Court observed that there are "several studies . . . showing the median

ratio of punitive to compensatory verdicts, reflecting what juries and judges have considered reasonable across many hundreds of punitive awards." (*Id.*, 128 S.Ct. at p. 2632.) The "studies cover cases of the most as well as the least blameworthy conduct triggering punitive liability, from malice and avarice, down to recklessness, and even gross negligence in some jurisdictions. The data put the median ratio for the entire gamut of circumstances at less than 1:1, . . . meaning that the compensatory award exceeds the punitive award in most cases. In a well-functioning system, we would expect that awards at the median or lower would roughly express jurors' sense of reasonable penalties in cases with no earmarks of exceptional blameworthiness within the punishable spectrum . . . ." (*Id.*, at p. 2633.)

The Supreme Court noted that it "has long held that '[p]unitive damages by definition are not intended to compensate the injured party, but rather to punish the tortfeasor . . . and to deter him and others from similar extreme conduct.' [Citation.]" (*Exxon Shipping Co. v. Baker, supra,* 128 S.Ct. at p. 2633.) The trial court here could have reasonably concluded that punitive damages of $1.2 million, together with compensatory damages in the same amount, were sufficient to punish appellant and "'deter [it] and others from similar extreme conduct.'" (*Ibid.*)

Appendix A

Disposition

The judgment and order awarding attorney fees are affirmed. Because appellant has not prevailed in its appeals and respondent has not prevailed in its cross-appeal, the parties shall bear their own costs on appeal.

NOT FOR PUBLICATION.

YEGAN, J.

We concur:

GILBERT, P.J.

COFFEE, J.

APPENDIX B — ORDER OF THE SUPERIOR COURT OF THE STATE OF CALIFORNIA, COUNTY OF VENTURA FILED JANUARY 16, 2007

SUPERIOR COURT OF THE STATE OF CALIFORNIA COUNTY OF VENTURA

Case No.: SC 041162

JAMES STEVENS, an individual

Plaintiff,

vs.

THE VONS COMPANIES, INC, a California corporation; SAFEWAY, INC., a Delaware corporation; LAURA MARKO, an individual; HARRY HAACKE, an individual; SHEILA FLANNIGAN, an individual; PAUL BARRON, an individual; and DOES 1 through 100, inclusive,

Defendants.

ORDER

This matter came on for hearing on January 16, 2007, on the motions of defendant The Vons Companies, Inc. for Judgment Notwithstanding the Verdict or, in the Alternative, Partial Judgment N.O.V. and for New Trial or, in the Alternative, Remittitur. Oral argument was presented and the matters submitted for decision.

Appendix B

The Court has considered the pleadings submitted in support and in opposition of the motions, the citations to the record and the evidence received at trial. The parties have adequately set forth the standards the Court is required to follow in ruling on these motions. Therefore, the Court will not discuss them in this Order. In addition, since the date on which this Court will lose its jurisdiction over this matter is looming and the Court is unavailable after this date[1], the Court will not engage in as lengthy a discussion of the issues as it would normally prefer.

MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT

Vons asserts that it is entitled to Judgment Notwithstanding the Verdict with regard to punitive damages, the claim for retaliation and the claim for sexual harassment. The Court finds there is sufficient evidence to support the jury's decision on all of these issues. Therefore, the Court is compelled to deny the motion in all respects.

---

1. The parties selected this date for hearing without consultation with the Court and without knowledge or consideration of any other commitments the Court may have. Due to the briefing schedule agreed upon by the parties, the hearing could not be advanced. Due to the running of the 60 days from Notice of Entry, the hearing could not be continued.

Appendix B

MOTION FOR NEW TRIAL/REMITTITUR

After considering all of the pleadings, argument of counsel and evidence submitted, the Court is convinced that both the compensatory and punitive damages awarded by the jury are excessive. Although ordering a retrial on the issue of damages only was considered, the Court finds that it would be an injustice to the parties to do so. However, the Court is also convinced that remittitur is appropriate in this case. Therefore, the Court will conditionally grant the motion for new trial of all issues pursuant to CCP sections 657(5) and 662.5.

As to compensatory damages on the sexual harassment cause of action, the Court finds that the award of $500,000 is excessive. Bearing in mind that the relevant period is July 9, 2002, to September 23, 2002, the Plaintiff's testimony regarding his damage consisted primarily of his statement that he was "upset, frustrated and angry" over Ms. Marko's conduct. His testimony at trial was that most of his emotional distress and damage came after the transfer to store 3080, when he would think about what happened to him as he was driving to and from work and he was worried about what others would think of him because of the transfer. There was no evidence that he experienced any interference with his activities of daily life (work or personal), had trouble sleeping, had any physical manifestations or suffered anything other than minimal emotional distress. The vast majority of his testimony regarding the effects of Ms. Marko's conduct related to his reactions to events that occurred prior to July 9, 2002, or subsequent to September 23, 2002.

Appendix B

As to compensatory damages on the retaliation cause of action, the Court cannot find that the damages are excessive. The finding of the amount of economic damages is supported by the record. While an award of $1,000,000 for non-economic damages is quite high, the Court cannot find it to be excessive in light of the extreme psychological effect the termination had on Mr. Stevens. He stopped functioning as a productive member of society, became withdrawn and saw his marriage fall apart.

The Court finds the punitive damages to be excessive, both as a matter of fact and a matter of law.

The Court is convinced that the amount of punitive damages awarded was a result of passion and prejudice on the part of the jury. The Court makes this finding based upon the fact that the jury awarded the plaintiff far more than plaintiff's counsel requested. In the Court's experience, in any given case, plaintiff's counsel is in the best position to assess the uppermost limits of a reasonable amount to expect based upon all of the evidence, and to ask the jury to award that amount. Here, Mr. Goldberg asked for an award equal to six times the total compensatory damages. The jury awarded ten times the amount. While it is clear that the jury was outraged and wanted to send a strong message to Vons, it is also clear that its award was not based upon the type of calm, dispassionate and reasoned decision making that is required of a finder of fact.

Appendix B

The Court also finds that the amount of punitive damages is constitutionally excessive under the factors contained in *State Farm Mutual Insurance Co. v. Campbell* 538 U.S. 408 (2003). With regard to reprehensibility, the Court finds the following factors favor plaintiff: The conduct was aimed at a target who was financially vulnerable and the conduct involved intentional trickery or deceit. The Court finds the following factors favor defendant: The harm caused was not physical, the conduct did not involve indifference to or reckless disregard of health or safety and there was no evidence the conduct was other than an isolated incident. Therefore, the Court believes the degree of reprehensibility was low to moderate.

The relationship between compensatory and punitive damages would weigh in favor of a lower level of damages. The Court has already found that the amount of compensatory damages awarded for the sexual harassment is excessive. Based upon the evidence adduced at trial, the amount awarded for the retaliation is sustainable, but quite high, and the Court believes contains an element of punishment. The Court's belief is based upon the size of the award and upon the jury's later award of greater punitive damages than requested by plaintiff's counsel.

The parties agree that maximum civil penalty in this case would be $150,000. A punitive damage award that is over 111 times the maximum civil penalty is not proportionate.

Appendix B

ORDER

The Court will deny the Motion of Vons Companies for New Trial on condition that the plaintiff agrees to remit all sums in excess of $1,200,000 compensatory damages (total for both sexual harassment and retaliation) and $1,200,000 punitive damages. Plaintiff's agreement must be filed on or before January 31, 2007. If Plaintiff fails to agree to the remittitur, the Motion of Vons Companies for New Trial is granted.

The Clerk is directed to serve a copy of this Order on the parties.

s/ William Q. Liebmann
WILLIAM Q. LIEBMANN
Judge of the Superior Court

Dated: January 16, 2007

APPENDIX C — JUDGMENT OF THE SUPERIOR COURT OF THE STATE OF CALIFORNIA, COUNTY OF VENTURA FILED NOVEMBER 20, 2006

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF VENTURA

CASE NO: SC 041162

[Assigned for all purposes to the Honorable William Q. Liebmann]

JAMES STEVENS, an individual,

Plaintiff,

vs.

THE VONS COMPANIES, INC., SAFEWAY, INC., LINDA MARKO, HARRY HAACKE, SHEILA FLANNIGAN, PAUL BARRON, and DOES 1 through 100, inclusive,

Defendants.

JUDGMENT

This action came on regularly for trial on September 18, 2006, in Department S3 of the Superior Court for the County of Ventura, State of California, before the Honorable William Q. Liebmann, Judge. The plaintiff was James Stevens, an individual, who appeared through

Appendix C

Nathan Goldberg, Esq. of Allred, Maroko and Goldberg and Roxanne Davis, Esq. of Davis*Gavsie, PLC. The defendant at trial was Vons Companies, Inc., who appeared by Michael J. Bononi of the Bononi Law Group.

A jury of 12 persons was regularly impaneled and sworn. Witnesses were sworn and testified. The jury deliberated and thereafter returned into court on October 25, 2006 with its special verdict for plaintiff as follows:

SEXUAL HARASSMENT IN VIOLATION OF FEHA AND/OR PUBLIC POLICY

1. Was James Stevens subjected to unwanted sexually harassing conduct by Laura Marko because he was a male?

Answer "yes" or "no."

Answer: YES

2. Was the sexual harassment so severe, widespread, or persistent that a reasonable male employee in James Stevens' circumstances would have considered the work environment to be hostile or abusive?

Answer "yes" or "no."

Answer: YES

3. Did James Stevens consider the work environment to be hostile or abusive?

Answer "yes" or "no."

Answer: YES

4. Was the sexually harassing conduct a substantial factor in causing harm to James Stevens?

Answer "yes" or "no."

Answer: YES

5. What are James Stevens' damages, if any, on his claim for sexual harassment against The Vons Companies, Inc.?

a. Non-economic Loss:	$500,000.00
TOTAL	$500,000.00

6. Has James Stevens proved by clear and convincing evidence that The Vons Companies, Inc. was guilty of oppression, malice, or despicable conduct upon which you based your finding of sexual harassment?

Answer "yes" or "no."

Answer: YES

7. Did an officer, director, or managing agent of The Vons Companies, Inc., by clear and convincing evidence, commit, authorize or ratify the conduct of sexual harassment, which you found to be oppressive or malicious?

Answer "yes" or "no."

Answer: YES

8. Did The Vons Companies, Inc. fail to take all reasonable steps to prevent the sexual harassment of James Stevens from occurring?

Answer "yes" or "no."

Answer: YES

RETALIATION IN VIOLATION OF FEHA-TERMINATION

18. Was James Stevens' complaints of sexual harassment a motivating reason for any adverse employment action taken against him by The Vons Companies, Inc.?

Answer "yes" or "no."

Answer: YES

Appendix C

19. Was The Vons Companies, Inc.'s retaliatory conduct a substantial factor in causing harm to James Stevens?

Answer "yes" or "no."

Answer: YES

20. What are James Stevens' damages, if any, caused by The Vons Companies, Inc.'s retaliation?

a.	Economic Loss:	$ 172,988.00
b.	Non-economic Loss:	$1,000,000.00
	TOTAL	$1,172,988.00

21. Has James Stevens proved by clear and convincing evidence that The Vons Companies, Inc. was guilty of oppression, malice, or despicable conduct upon which you based your finding of retaliation in this section?

Answer "yes" or "no."

Answer: YES

22. Did an officer, director, or managing agent of The Vons Companies, Inc., by clear and convincing evidence, commit, authorize or ratify the retaliation, which you found to be oppressive or malicious in this section?

Answer "yes" or "no."

Answer: YES

The jury then returned to deliberations, and thereafter returned into court on October 27, 2006 with its special verdict on punitive damages for plaintiff as follows:

What amount of punitive damages, if any, do you award James Stevens?

$16,729,880

NOW, THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED that plaintiff James Stevens recover from defendant The Vons Companies, Inc. the sum of Eighteen Million, Four Hundred and Two Thousand, Eight Hundred Sixty Eight Dollars ($18,402,868).

The total amount of damages due in favor of plaintiff James Stevens, Eighteen Million, Four Hundred and Two Thousand, Eight Hundred Sixty Eight Dollars, together with reasonable attorneys fees and costs to be

determined by the Court, shall bear interest from the date of entry of this Judgment at the rate of ten percent (10%) per annum until paid.

The Court determines that plaintiff shall recover reasonable attorney fees and costs in the amount of $_____.

DATED: NOV 17 2006

By: s/ William Q. Liebmann
Hon. William Q. Liebmann
Judge of the Ventura County Superior Court

APPENDIX D — ORDER OF THE COURT OF APPEAL OF CALIFORNIA, SECOND APPELLATE DISTRICT, DIVISION SIX DENYING PETITION FOR REHEARING FILED FEBRUARY 18, 2009

COURT OF APPEAL OF CALIFORNIA, SECOND APPELLATE DISTRICT, DIVISION SIX

No. B196755

2009 Cal.App.Unpub.LEXIS 1306

JAMES STEVENS,

Plaintiff and Appellant,

v.

VONS COMPANIES,

Defendant and Respondent.

February 18, 2009, Filed

Respondent's [sic] Cross-Appellant's petition for rehearing is denied.

APPENDIX E — OPINION OF THE SUPREME COURT OF CALIFORNIA DENYING PETITION FOR REVIEW FILED APRIL 1, 2009

SUPREME COURT OF CALIFORNIA

S170839

2009 Cal.LEXIS 3613

JAMES STEVENS,

Plaintiff and Respondent,

v.

VONS COMPANIES,

Defendant, Respondent, and Cross-Complainant.

And Consolidated Case.

April 1, 2009, Filed

JUDGES: GEORGE, Chief Justice.

OPINION

Petition for review denied.